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No. 89-1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT U.S. TANKER OWNERS COMMITTEE, *et al.*,
Petitioners,

v.

SAMUEL K. SKINNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

Petitioners Independent U.S. Tanker Owners Committee, *et al.*, reply to the briefs in opposition to the petition for a writ of certiorari.[1]

I. SECTION 505

Petitioners' first question asks whether an appropriations rider, cast in typical form as a prohibition literally

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[1] On April 9, 1990, the court of appeals recalled and modified its mandate, reaffirming its judgment of August 22, 1989, in all respects, but remanding to the district court for resolution of a distinct claim under the National Environmental Policy Act not addressed by the district court or court of appeals. The remand expressly does not disturb the distinct statutory claims decided by the court of appeals, and those claims are properly before this Court. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 580-81 (1980).

against expenditure from appropriated funds but designed by Congress to preclude a specific agency rule then under consideration, must be given its intended effect even if the rule issues just before the bill passes.

The answer of federal respondents seems to be that such a rider is to be read literally except where "literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters". They then argue that this is not such an exception, or in other words that the question is not presented here. Fed. Opp. 12 note 11 [citation omitted]. On the other hand, Arco et al. (hereafter Arco), pressing for the literal meaning, contend that petitioners are seeking "different rules of construction" by which appropriations would "be applied retroactively despite their plain meaning". Arco Opp. 13.[2]

A. That this case fairly presents the question is evident from the decision below, which rested its conclusion that Congress did not intend to preclude entry of the particular ships precisely on the form of § 505 as a limitation of expenditure which "inherently" operates for the future. Pet. App. 19a. And that the real intention of Congress was to preclude their entry is facially apparent. Section 505 specifically said that the ships previously admitted under the rule invalidated by *ITOC II* —that is, these ships—were not now to be admitted

[2] Unlike the federal respondents, Arco argues that legislation by appropriation act is bad practice in which Congress should not be encouraged by adopting anything but the most literal reading, and that even if (as it concedes may happen) there may occasionally be a requirement to employ it for emergency action, this was not such a case. Arco Opp. 13-14. The propriety of the practice as such may safely be left to Congress; but the time frame that the agency imposed, 83 days from proposal to promulgation with immediate effectiveness even as the conference committee was meeting, sufficiently vindicates the judgment of both courts below, Pet. App. 29a; 16a, that an unseemly race was being run against Congress, and of Congress itself that the fastest legislative track was required.

whether by rule, adjudication or other process, or by contract. What was the point of such specific reference to them, practically by name, and with such elaboration of prohibitions against any conceivable form of agency action to admit them, if Congress thought they were already in? If Congress thought that, what "future" application did it intend for a prohibition against admitting them at all? [3] The intention to exclude the particular ships is inexpugnable. If this is not "plain meaning" the concept has no content.[4]

Federal respondents suggest that the legislative history is "inconclusive" on the meaning of the statute, Fed. Opp. 12 note 12, while Arco says it "makes clear" a "prospective" application only. Arco Opp. 10 ff. Both statements are wrong.

The Government's suggestion of inconclusiveness derives from comparing the conference report with statements by Senator Hollings and Representative Regula. It does not say how it counted the conference report (see infra), but the Senator is correctly cited as saying the conferees intended to exclude the ships, and the Representative as saying the opposite. But the citation shows

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[3] Conforming to "the ancient and sound rule of construction that each word in a statute should, if possible, be given effect", and that "An interpretation that needlessly renders some words superfluous is suspect", *Crandon v. U.S.*, 110 S. Ct. 997, 1008 (1990) (Scalia, J., concurring), Arco attempts to give an alternative "forward-looking" meaning to this prohibition, Arco Opp. 9 note 12, but it merely underscores the point: if the intention was to let the ships remain, why should Congress forbid further agency action "on remand" to do so?

[4] Arco charges petitioners with abandoning their reliance on plain meaning, Arco Opp. 7 note 6, but it confuses literalism with plain meaning. As in many other contexts, the *literal* reading here that no money is to be spent to allow entry of subsidized ships into domestic trade must not obscure the *plain* meaning that subsidized ships (specifically including the ships covered by the rule) are not to be allowed in.

on its face that Senator Hollings' statement was made in debate on July 1, 1987, when the bill passed the Senate, while Representative Regula's was made July 30, a month after the House action on June 30, and in the form of an extension of remarks printed in the appendix to the Congressional Record. The Court attaches little weight to post-debate statements, *Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 note 3 (1982) and cases cited, and especially of an opponent (as Representative Regula says he was) seeking to gloss legislation he vainly opposed. *Shell Oil Co. v. Iowa Dept. of Revenue*, 109 S.Ct. 278, 284 (1988).

As for the conference report, Arco can cite it as "forward-looking", Arco Opp. 12, only by an unwarranted interpolation and some astonishing ellipses that entirely change its character.[5] With the ellipses restored, it makes incontrovertible the intention—consistently

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[5] The report reads in full (emphasis added): "Amendment No. 419: Restores language proposed by the House and stricken by the Senate, with a change in the first section number from '506' to '505'. The House language restored by the conference agreement prohibits the Department of Transportation or the Maritime Administration from using funds appropriated or made available by this or any other Act or otherwise appropriated or made available to the Secretary of Transportation or the Maritime Administration for purposes of administering the Merchant Marine Act, 1936, as amended, *to propose, promulgate or implement any rule or regulation concerning vessels which repaid subsidy under the rule issued by the Secretary of Transportation on May 3, 1985, and vacated by the U.S. Court of Appeals for the District of Columbia on January 16, 1987*; conduct any adjudicatory proceeding; execute or perform any contract; or participate in any judicial action concerning repayment of construction differential subsidy for the permanent release of vessels from the restrictions in section 506 of the Merchant Marine Act of 1936, as amended. The language also provides that the restrictions on the use of such funds do not apply to the extent that such expenditures relate to a rule which conforms to statutory standards hereafter enacted by Congress. The Senate bill contained no provision on this matter." H. Conf. Rep. No. 195, 100th Cong., 1st Sess. 112 (1987).

with the debate and the statutory language—to exclude the specific vessels.[6]

B. Did then Congress fail to accomplish its purpose because the bill became law 19 days after the rule purported to admit them?

The court of appeals conceded that Congress could simply have directed the agency to withdraw the rule. Pet. App. 21a.[7] In a statute of that form, all arguments about completed administrative action requiring no further proceedings or expenditures fall to the ground; Congress could not be outraced but had only to specify the action it wished canceled.

But once this is conceded, the form of the statute is obviously immaterial: it is always the substantive Congressional intention that must be respected. The question is merely what Congress intended in this law.

We have shown above that what Congress intended was to exclude these ships. The law is clear that this intention must be obeyed, whether or not there remained administrative action to be performed or expenditures to be made.

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[6] Arco further contends that § 505 cannot refer to the ships named in the rule because its language, originally passed by the House *before* the rule issued, was not changed in conference *after* the rule issued. No change was required. In *Nat. Treasury Emp. Union v. Devine*, 733 F.2d 114, 117 (D.C. Cir. 1984), the court of appeals dealt with an identical situation and held that Congress' omission to change the language reflected its judgment that the original language sufficiently covered any change in the final rule, pointing to the same word that appears here: "implement". Here, Senator Hollings gave exactly this explanation in the colloquy cited by the federal respondents, 133 Cong. Rec. S9142 (daily ed. July 1, 1987).

[7] The court therefore saw no such constitutional issue of retroactivity as Arco vaguely suggests. Arco Opp. 8 note 10.

In one obvious sense, there remained technical things to be done;[8] but § 505 precludes *implementation* of the payback rule and *performance* of any contract thereunder. Surely the rule is being implemented when the ships by virtue of the rule continue to operate in domestic trade. Surely a contract is being performed when by virtue of the contract previously made, the ships continue so to operate. It will not do to say that the agency had no function but to promulgate the rule or execute the contract, and that these thereupon became self-effectuating. The content of "implement" and "perform" lay, as respondents rightly concede, Arco Opp. 9, in not enforcing the trading restrictions of § 506 of the 1936 Act. As in *Nat. Treasury Emp. Union v. Devine*, 733 F.2d 114, 120 (D.C. Cir. 1984), the prohibition extends "to block *any* further implementation, administration or enforcement of the regulations" by anyone, and the regulations "are therefore without any effect whatsoever" during the effective period of the law, which in this case extends until further Congressional action.[9]

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[8] Arco makes the extraordinary assertion that although § 506 of the 1936 Act requires every owner of a ship built with construction subsidy to agree by contract to operate it exclusively in foreign trade, no amendment is required to release this restriction because § 506 "says nothing about written CDS contract amendments". Arco Opp. 9. It says nothing about payback either, an omission that did not prevent this Court from finding it implicit in the agency's contracting power itself. *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). So far as can be ascertained, this is the first instance in which an enlargement of operating limitations in a subsidy contract has not been reduced to writing, and respondents themselves are obliged to concede that under the prior repayment rule (and, indeed, under both prior repayment rules) the agency did execute formal amendments. The proposition that "MarAd could, and did, simply decide unilaterally not to enforce the domestic trading restrictions in the original CDS contracts" has only to be stated to carry its own refutation.

[9] The holding below is squarely in conflict with that court's own previous approach in *Devine*. Although holding that further agency action was there required, it said that even had that not been the

II. THE MERCHANT MARINE ACT

Petitioners' second question addresses the agency's declination to consider granting operating subsidy to the ships for operation in the foreign trade for which they were built instead of turning them into the overtonnaged domestic trade. The Solicitor General is entirely mistaken in asserting that petitioners did not preserve this issue before the court of appeals, whose opinion expressly recites that they did so, Pet. App. 13a: they also raised it before the agency, J.A. 677, 701-702, which rejected it, Pet. App. 76a; in the district court, which accepted their argument, Pet. App. 42a; and in the court of appeals, which as said expressly recites their contention in overruling the district court (although with evident doubt), supra.

On the merits, federal respondents do little more than recite with minor embellishment the reasons the agency gave for refusing to consider subsidy. The question is not whether it passed on the issue. Of course it did. But respondents do not at all address petitioners' contention that these reasons are not the statutory reasons for rejecting this alternative. As the district court said, Pet. App. 42a, "The rejection of the ODS option is never discussed by the agency in terms of how it helps or hinders the objectives of the Merchant Marine Act." The court of appeals said that subsidy costs are obviously an intended expense "to achieve the explicit congressional objective", and only deferred to the agency on the ground that courts cannot decide when subsidies are to be awarded. Pet. App. 14a. Respondents do not face the issue, although they explicitly acknowledge (Fed. Opp. 13) that § 601(a), 46 App. U.S.C. § 1171(a), makes the purposes and policy of the act the controlling standard,

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case, and even could the regulations have been implemented by other agencies without supervision by the issuing agency, they could not be allowed to take effect against the obvious Congressional intention, also expressed in an appropriations rider, that they should be totally arrested pending—as here—further legislative study.

as the district court held. They make no attempt to establish that the agency or the court below applied that standard.[10]

Apart from adjectival embellishments, such as characterizing as "huge" the estimated $5 million annual subsidy per vessel,[11] Arco's position is answered in the same way. In urging that § 601(a) is mandatory, petitioners do not suggest that the agency was required to give subsidy: they merely say that § 601(a) requires it to consider qualified applications in the light of the purposes and policy stated in § 101, and that under that standard it may not reject them on the ground that the statute affords too much money or will offend foreign powers or is "not sound policy".

Arco defends the agency's action as producing a "well-balanced fleet" and as having "no negative effect on any of the other objectives" of the act, whether in the domestic or foreign trade. Arco Opp. 16. It likewise asserts that domestic operators are not entitled to be free of competition introduced by the goverment.

In 1985, the agency predicted that the rule—indeed, this was its purpose—would for ten years reduce coast-

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[10] Federal respondents make a revealing addition to the agency's stated reasons, that the costs are "incompatible with federal budgetary limitations." Fed. Opp. 13. The agency did not say this, but if it lay in the background it emphasizes the non-statutory criteria on which the decision rested.

[11] As for the "hugeness" of this sum, it may be contrasted with what the agency pays other subsidized ships. According to data published by the statutory Commission on Merchant Marine and Defense, the average annual subsidy paid for bulk-carrying vessels such as these tankers and for liner vessels is $3.1 million per vessel for both classes. Third Report to Congress 54, 55 (September 1988). The weighted average cargo capacity of the subsidized bulk carriers is approximately 60,000 dwt, and for liners approximately 25,000 dwt, yielding an annual average subsidy cost per cargo carrying unit respectively of $51 and $125. The average size of the VLCCs here in question is 250,000 dwt, which at $5 million yields an average annual subsidy of $20 dwt. Evidently there are economies of scale for subsidy costs as well as for operating costs.

wise freight rates to *nonprofit break-even for the most efficient tonnage. ITOC II*, J.A. 1054, 1072; 50 Fed. Reg. 19170, 19175 (May 7, 1985).

In 1978, the agency analysis provided a further forecast of the rule's financial consequences to the industry on the basis of which the government conceded below that rates are and have been noncompensatory for every class of tonnage. Pet. 16.

It is saying no more than the obvious to suggest that an agency whose function is to foster the development and encourage the maintenance of the merchant marine, § 101, must explain how inflicting a destructive rate structure contributes to realizing that policy. Nowhere is addressed the question of whether the "well-balanced fleet" in the name of which this was done, and which lasted just long enough to achieve the forecast destruction,[12] was a higher aim than the well-being of the whole merchant marine. The error of the court below lay in failing (unlike its proceedings in *ITOC I* and *II*) to require this question to be answered.

Respectfully submitted.

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[12] Pet. 16 and note 10. The BAY RIDGE has also now defaulted and been repossessed by the government, as well as the ADONIS, 80,000 dwt. The Maritime Administration also reports that American-flag movement of Alaskan oil via Panama was down below 200,000 barrels a day the first two months of 1990, one-third of its forecast in the rulemaking.

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